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IN THE

Supreme Court of the United States

OCTOBER TERM 1948.

No. 387

387

TRANSCONTINENTAL & WESTERN AIR, INC., *Petitioner,*

against

CIVIL AERONAUTICS BOARD, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION OF CAPITAL AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND

BRIEF AS AMICUS CURIAE

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MOTION OF CAPITAL AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Capital Airlines, Inc., by its attorneys, hereby moves this Court for leave to file the attached brief as *amicus curiae* herein, pursuant to Rule 27 (9) of the Rules of this Court. This motion should be granted for the following reasons:

1. Like the Petitioner herein, Capital Airlines, Inc., holds certificates of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the Civil Aeronautics Act of 1938, as amended.

2. Capital Airlines, Inc., has a vital interest in this proceeding. Like the Petitioner, Capital Airlines incurred very damaging financial losses because of the inadequacy of the mail rates which were established for it by the Civil Aeronautics Board. Like the Petitioner here, Capital Airlines petitioned the Civil Aeronautics Board for an increase in its mail rate for a period prior to the date of filing its petition.

3. In Capital's case (as in Petitioner's) the Board held, among other things, that it had no power to adjust the mail rate for any period prior to the filing of the petition. This ruling by the Board was affirmed by the United States Court of Appeals for the District of Columbia Circuit on December 6, 1948. Capital Airlines is now preparing, and will shortly file in this Court, a petition for a writ of certiorari.

4. Should this Court render a decision favorable to Petitioner in this case, such a decision would require that Capital's petition for a writ of certiorari be granted. It would also require a reversal of the decision of the United States Court of Appeals in Capital's case.

5. Only within the last week has Capital Airlines been apprised of the arguments advanced to this Court in Petitioner's brief. Capital fully endorses and subscribes to all of Petitioner's compelling points.

6. In addition to the points presented by Petitioner, there is a supplementary point which Capital believes will prove helpful to this Court in reaching its decision. Capital submits that the impact of the Fifth Amendment to the Constitution requires that the Civil Aeronautics Act be construed as conferring upon the Civil Aeronautics Board full power to grant Petitioner and Capital the relief they request.

7. The attached brief of Capital Airlines as *amicus curiae* covers this one point, and we submit that it is worthy of consideration by this Court in this vital case.

8. The Solicitor General has consented to the filing of this brief as *amicus curiae* but, because of the short time remaining before the oral argument of this cause, is constrained to condition his consent on this Court's granting to the Civil Aeronautics Board leave to file a reply to Capital Airlines' brief within 10 days after the oral argument. We join with him herewith in requesting such leave.

9. Copies of this motion and the attached brief have been served upon the Solicitor General, the general counsel of the Civil Aeronautics Board, and counsel for petitioner.

WHEREFORE, Capital Airlines, Inc., respectfully moves this Court for leave to file the attached brief as *amicus curiae*.

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Washington 6, D. C.,
Of Counsel.

February 4, 1949.

Consented to on the condition stated:

PHILIP B. PERLMAN,
Solicitor General.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF AS AMICUS CURIAE.

Capital Airlines, Inc. has filed this brief as *amicus curiae* because it has a vital interest in this case. Like the Petitioner, Capital lost millions of dollars due to an inadequate mail rate. Like the Petitioner here, it petitioned the Civil Aeronautics Board for an increase in its mail rate for a period prior to the date of filing the petition. As in the Petitioner's case, the Board ruled, among other things, that it had no power to adjust the rate for a period prior to the initiation of a mail rate proceeding and dismissed Capital's petition without consideration of the merits.

This action of the Board was affirmed on petition for review by the Court of Appeals for the District of Columbia Circuit on December 6, 1948 (opinion not yet reported), and Capital Airlines is preparing a petition for writ of certiorari to be filed in this Court.

The petition of Capital Airlines for a writ of certiorari will be based, in part, upon grounds not available to the Petitioner in this case. Nevertheless, a decision here in favor of the Petitioner would require the granting of the petition to be filed by Capital Airlines and a reversal of the Court of Appeals in Capital's case.

We endorse all of the arguments made by the Petitioner, but this brief is addressed to a single point which, we submit, is conclusive.

The Impact of the Fifth Amendment to the Constitution Requires that the Civil Aeronautics Act Be Construed to Confer Upon the Board Power to Increase a Mail Rate for a Period Prior to the Initiation of a Mail Rate Proceeding.

This is a different point from that presented by Petitioner's Question No. 2, and by Specification of Errors No. 9 in Petitioner's supporting brief. We do not mean that the existence of the power to adjust mail rates retroactively is necessary to the Constitutional validity of the Civil Aeronautics Act.[1] Our point here bears solely upon

---

[1] Although the services rendered by the air carriers are compulsory, so that reasonable compensation therefore is a constitutional right, the validity of the Act may possibly be sustained even though it fails to provide adequate administrative machinery for obtaining such compensation, so long as a remedy remains in the Court of Claims. United States v. Griffin, 303 U. S. 226, 238; Jacobs v. United States, 290 U. S. 13, 16; Yearsley v. W. A. Ross Construction Co., 309 U. S. 18, 21. "The provision for recovery of compensation against the United States through suit in the Court of Claims is sufficient compliance with the Constitutional provision for just compensation". Timken-Detroit Axle Co. v. Alma Motor Co., (CCA 3) 144 F. (2d) 714.

the statutory construction which should be placed upon the Act in determining whether Congress delegated complete power to the Board. This point rests upon the controlling influence to be given the Fifth Amendment in construing any statute designed to provide a system of just compensation for compelled services. This point was overlooked by the Court of Appeals and was not considered in its opinion in the case below.

Our position is identical with that adopted by this Court in the case of *United States* v. *New York Central Railway Company*, 279 U. S. 73. Notwithstanding expressions in the Railway Mail Pay Act of 1916 which indicated that Congress contemplated the fixing of rates to be effective only for the future (i.e., from and after the entry of an order), this Court held that the impact of the Fifth Amendment required an interpretation of the statute which would give the Commission power to raise the rate retroactively. The *New York Central* case, if properly understood and applied by the Court below, should have been conclusive of its decision in this case.

The Court below said:

> "The language of the disputed clause [of the Act] is not necessarily retroactive. It is as apt in reference to the future as it is to the past."

This is simply another way of saying that the language is just as apt in reference to the past as to the future, and therefore affords no obstacle to the invocation of the rule of interpretation of the *New York Central* case. Under the paramount rule of construction adopted in the *New York Central* case, there was, under such circumstances, no room for resort to standards of doubtful reliability (such as

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In this brief the Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called the "Board". The Civil Aeronautics Act of 1938 (Act of June 23, 1938, c. 601, 52 Stat. 977 ff., 49 U. S. C. 401 ff.) will be called the "Act". All italics are ours unless otherwise specified.

egislative history, analogy to public utility rate statutes, nd analogy to systems of payment for services not compelled but rendered under voluntary contracts).

The rule of interpretation adopted in the *New York Central* case, condensed and expressed in the Court's own words, is as follows:

> "To save its constitutionality there is coupled with the requirement to transport a provision that the railroads shall receive just compensation. . . . The Government admits, as it must, that reasonable compensation for such required services *is a constitutional right* . . . this right may be enforced, in the absence of other remedies, by an action to recover compensation already due. . . . Obviously *Congress intended the Commission to settle the whole business*, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act. No reason can have existed for leaving the additional annoyance and expense of a suit for compensation during the time of the proceedings. . . . *Unless the Commission has the power assumed, a part of the railroads' constitutional rights will be left in the air.*" (279 U. S. at 78, 79)

The time of the pendency of the proceedings was the only past period for which the railroads sought relief in that case. The same reasoning applies to confer the *power* to fix rates for *any past period* which has not already been actually reviewed.

In the recent *Alaska Airlines Mail Rate Case* the Board itself correctly applies the rule of construction adopted in the *New York Central* case, and held that under the Act it had the power to adjust a rate for a period extending back more than four years prior to the filing of a petition for such adjustment (Opinion and Order Serial No. E-1885, August 13, 1948). In that case, a certificate of public convenience and necessity had been issued to Alaska on December 5, 1942. Section 405 (a) of the Act provides that in such event, until the Board shall fix a rate under section 406 (a), the Postmaster General shall pay at the rates pre-

viously fixed either by contract or by orders of the Interstate Commerce Commission. Alaska did not file any petition whatever for the fixing of a rate under section 406(a) until 1945, and it was not until April, 1947 that it requested the Board to reconsider and adjust the rate for the period from 1942 to 1945. The Board, relying upon the same reasoning on which we rely here, held that the Act conferred upon it the power to do so.

In its opinion in the *Alaska* case the Board said:

> "This case depends upon whether it was the intent of Congress that the rates provided in Section 405(a) were to be final until brought in issue by the institution of a proceeding, or whether it was intended that such rates be only provisional to afford carriers some compensation until the Board had an opportunity to fix final rates under the Act. • • •
>
> "The Civil Aeronautics Act is a comprehensive statute designed to regulate air commerce. Its concern is not only with the needs of the postal service but with national commerce and defense as well. *Certificates of convenience and necessity carry with them many obligations imposed by law.* Section 401(m) requires a carrier certificated for mail service to carry mail whenever required by the Postmaster General. Section 404(a) states in part that 'it shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor.' Section 401(k) forbids the abandonment of any route without previous approval by the Board, which approval may be given only upon a finding that abandonment is in the public interest. Failure to fulfill these and many other obligations are not matters to be compensated for by mere damages. Section 41(h) provides for suspension or revocation of certificates. Title IX imposes serious civil and criminal penalties. The Act, however, does not stop with imposition of obligations alone. In addition to the usual benefits that go with certificates of public convenience and necessity, the Board is directed under Section 406 to consider the '. . . need of

each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality *required* for the commerce of the United States, the Postal Service, and the national defense.'

"*In view of these extensive obligations and corresponding benefits that devolve upon a carrier upon the issuance of a certificate, it does not stand to reason that Congress intended that the rates provided in Section 405(a) should be final.* It must be remembered that these were rates fixed by contract in 1938. The Postmaster General was only interested, and properly so, in securing the best agreement for transporting mail. Any suggestion that Congress deliberately sought the continuation of any advantage contained in these contract rates must be rejected for the reason that there was no prohibition imposed with respect to the time within which rate proceedings could be instituted. We are further strengthened in our conviction that these rates were not intended to be final by the provisions of Section 401(m) which require a carrier certificated for mail service to carry mail and direct that, 'such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.' The word 'reasonable' conforms to the rate-making language and standards of Section 406 rather than to the contract price language of Section 405(a). . . ."

(Opinion of the Board, Order Serial No. E-1885, August 13, 1948, at pp. 3-5)

There is not a word in section 405(a) which confers any more power on the Board to adjust retroactively rates previously fixed thereby than in the case of rates previously fixed under section 406(a). The attempted distinction by the Board between the *Alaska* case and the Petitioner's case is wholly devoid of substance. The same principles

which supported the retroactive power in that case demand that its existence be found in this case.

We submit that the rule of the *New York Central* case *would* have been persuasive upon the Court below except for the presence in the opinion (by Mr. Justice Holmes) of the following dictum:

> "We *assume* that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint." (279 U. S. 78)

This assumption was no doubt based upon the apparent acquiescence of the railroads in its correctness. The original applications of the railroads included requests for adjustments for periods of a few months prior to the filing of the applications. They did not see fit to include in their petitions in the Court of Claims a claim for additional compensation for any period prior to the filing of the applications. In fact, it appears from 95 I. C. C. 304 that the railroads expressly waived their claims to any adjustments for periods prior to the filing date in the proceedings before the Commission. The question of the power of the Commission to make such adjustments was therefore not before either the Court of Claims or this Court and was not passed upon. The case cited in support of the dictum, *American Smelting & Ref. Co.* v. *United States*, 259 U. S. 75, dealt with *contract* prices, not with requisitioned or compelled services. The assumption, therefore (which, like all assumptions, is subject to rebuttal as in this case) was pure dictum. Yet the Court below, apparently regarding this dictum as an authoritative limitation upon the power to adjust mail rates retroactively, gave no consideration whatever to the rule of interpretation upon which the actual decision of the *New York Central* case was based. Conceivably this dictum *might* have been regarded as persuasive against the retroactive exercise of the retroactive power in the *Alaska* case, since Alaska's then existing rates had been originally fixed by *contract*, but it has no application here.

Even if it were conceded that the dictum of Mr. Justice Holmes had any value when applied to the Railway Mail Pay Act of 1916, there are significant differences between the language and provisions of that Act and those of the Civil Aeronautics Act which make wholly untenable the proposition that the power of the Board, under the latter Act, to adjust rates retroactively, is limited to periods subsequent to the initiation of a rate proceeding.

Under the Railway Mail Pay Act, the initial proceeding for fixing a rate could be inaugurated only by the Postmaster General. (Section 5, subd. 30 (a), (b) and (c); 39 Stat. 429, 430; 39 U. S. C. 545, 546, 547). Subsequent to the fixing of the original rate, proceedings could be instituted to change it only upon an *application* either by the Postmaster General or by a carrier, and then only after six months. Subd. 30 (h). The Commission was directed to fix fair and reasonable rates *only* according to this procedure. The Commission was not, as is the Board by Section 406 (a) of the Civil Aeronautics Act, "* * * directed, *upon its own initiative*"[1] to fix the rate from time to time and "to make such rates effective *from such date as it shall determine to be proper*". Thus, while a mail rate once fixed under the Railway Mail Pay Act might reasonably be regarded as having the attribute of finality for six months and until the filing of a new application, a mail rate fixed under the Civil Aeronautics Act is provisional only, since the Board retains a continuing jurisdiction from day to day to alter the rate on its own initiative, without any application, and is under a continuing duty to exercise this initiative to the end that the rate of compensation be at all times fair and reasonable.

In the former case the rate may be, for a period, beyond the power of the Commission to alter. In the latter, the rate never escapes the jurisdiction of the Board, exercisable on its own motion. This unmistakably confers upon

[1] As well as upon the initiative of a carrier, etc.

the Board the power to readjust mail rates for any prior period in the performance of *the duty delegated to it by Congress* to fulfill the obligations of the Fifth Amendment. This distinguishing feature of the Civil Aeronautics Act was pointed out by the Board in its opinion in the *Alaska* case when it said that any suggestion that Congress intended the rates fixed by Section 405(a) to be continued until brought in issue by the institution of a proceeding, "must be rejected for the reason that *there was no prohibition imposed with respect to the time within which rate proceedings could be instituted.*" (*Supra*, at p. 5)

Differing from the case of the Railroads where the compulsory carriage of the mail was superimposed upon a long-established and relatively stable industry, the Airlines were placed under federal compulsion as to their entire operations in the developmental stage of the industry. On the passage of the Act they were required by Section 401 (a) to secure a certificate from the Board or to suspend operations altogether. Under Section 401 (h) the Board on its own initiative may alter or modify such certificates.

From all of their compelled operations the Airlines derive certain non-mail revenues. These revenues are subject to violent and frequent fluctuations. Yet it is the statutory duty of the Airlines to *develop* the industry, and this involves the extension of service and the introduction of new equipment despite the fact that traffic and expense factors are untested by experience. Mail pay is the method of compensation for all of these compelled services, not for transportation of the mail alone. The compensation, by Section 406 (b), is to be fixed at an amount sufficient "with all other revenues" to enable the carriers "to maintain and *continue the development* of air transportation to the extent and of the character and quality *required* for the commerce of the United States, the Postal Service, and the national defense." The reasoning of the Board in the *Alaska* case is convincing when it says:

> "In view of these extensive obligations and corresponding benefits that devolve upon a carrier upon the issuance of a certificate, *it does not stand to reason* that Congress inteaded that the rates provided in Section 405 (a) should be final." (*Supra*, at p. 4)

With so many variables certain to operate in the future, in the face of the utter impossibility of estimating in advance with any degree of accuracy the revenues and expenses, upon which the amount of the mail pay is made to depend, no statute can embody "a system of just compensation" unless it provides for a determination of that compensation based upon the actual facts of a past period which were unknowable when the rate was originally fixed. The philosophy of the Civil Aeronautics Act approaches that of the Federal Control Act of March 21, 1918 (40 Stat. 451) more closely than that of the Railway Mail Pay Act. Under the Federal Control Act, while there was provision for current payment, based on a "standard return", it was recognized that just compensation could not be finally determined until the facts had occurred upon which it was to be based. In *Commissioner* v. *Old Dominion S. S. Co.*, (CCA 2d) 47 F. (2d) 148, the Court said:

> "Here there was an admission of liability by the Government. . . . It was a conceded liability; the *amount*, however, was not determined until a later year. The Government did not concede liability to pay merely the standard rate of return, but just compensation. Just compensation for the use of the properties for the years 1918, 1919 and 1920 was being incurred each year. Nothing remained to be determined at the close of each year except the amount of just compensation *on the basis of the past facts* and the established principles."

So, under the Civil Aeronautics Act, just compensation cannot be finally determined until the facts upon which it is to be calculated have occurred and their results, in terms of revenue and expense, reflected upon the carriers' books.

A "system of just compensation" which closes its eyes to the accomplished facts, upon which alone just compensation can be determined, is a contradiction in terms. The finding of the Court below that the Civil Aeronautics Act embodies such a travesty of justice should clearly be reversed.

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